Filed 7/13/10 Kinney v. Chaldau CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CHARLES KINNEY, Cross-complainant and Appellant, v. JOHN CHALDU et al., Cross-defendants and Respondents.	G042618 (Super. Ct. No. 01CC15035) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thierry Patrick Colaw, Judge. Affirmed.

Charles G. Kinney, in pro. per., for Cross-complainant and Appellant.

Sedgwick, Detert, Moran & Arnold, Thomas A. Delaney, Richard A. Crites and Jemma E. Eriksen for Cross-defendants and Respondents John Chaldu, Lynn Chaldu, Summer Chaldu and Chayne Chaldu.

Berger Kahn and Alan H. Boon for Cross-defendants and Respondents Chuck Viviani, Denise Viviani and Greg Viviani.

* * *

Based on the failure to prosecute (Code Civ. Proc., §§ 583.310, 583.360), the trial court dismissed the cross-complaint of Charles Kinney (Kinney) against cross-defendants John Chaldu, Lynn Chaldu, Summer Chaldu and Chayne Chaldu (Chaldus), and cross-defendants Charles Viviani, Denise Viviani and Greg Viviani (Vivianis). Kinney appeals, contending that the action on his cross-complaint was commenced when a default judgment was entered, when certain bifurcated actions were tried, or when the trial court entered an interlocutory judgment decreeing a 1999 storm drain improvement agreement (1999 Agreement) to be void. We disagree.

The entry of a default judgment is not the commencement of an action for the purposes of the five-year statute, so the entry of the default judgment against Three Arch Investment Company is of no help to Kinney. The trials against the State of California (state) and Sherrie Overton (Overton) did not address contested issues of fact or law affecting the cross-complaint against the Chaldus or the Vivianis, so those proceedings also did not make the five-year statute inapplicable.

A bifurcated trial—the Boone trial—was held on the third cause of action of plaintiff Three Arch Bay District (District). Although one might theorize that certain of the issues addressed in the Boone trial could conceivably have affected issues involved in the cross-complaint against the Chaldus and the Vivianis, Kinney stipulated that the Boone trial would have no collateral estoppel or res judicata effect against nonparties to that trial, such as the Chaldus and the Vivianis. Consequently, the Boone trial also does not support Kinney's argument.

Following the Boone trial, the District and defendant City of Laguna Beach stipulated for the entry of an interlocutory judgment to the effect that the 1999 Agreement was void. The trial court so entered judgment on the District's complaint. Because Kinney, in his sixth amended cross-complaint, had requested declaratory relief with respect to the agreement, he contends the entry of the interlocutory judgment decreeing the agreement to be void served as the commencement of the action on his cross-

complaint against the Chaldus and the Vivianis. However, Kinney cites no authority for the proposition that when two parties stipulate to the entry of judgment on a complaint, it is deemed to be the commencement of an action on a cross-complaint against persons who neither stipulated to the entry of judgment nor participated in the litigation on the complaint. Moreover, Kinney waived his arguments with respect to the effect of the interlocutory judgment for failure to raise them in the trial court and for failure to provide an adequate record for review. We affirm.

I

CHRONOLOGY

The District filed a third amended complaint against the City of Laguna Beach, Kinney, Chuck and Denise Viviani, John and Lynn Chaldu, the California Department of Transportation (Caltrans), Mike Boone (Boone), and certain others. The complaint was based on alleged liabilities arising out of a watercourse described as beginning in the City of Laguna Niguel, "continuing southwest through the District and then through Virginia Way, continuing through and past Coast Highway through the Boone Property where it ends at the cliffs above the ocean (the 'Subject Watercourse')."[1]

[1] The complaint further alleges: "The Subject Watercourse leaves the District just above Virginia Way, once a private street owned by Three Arch Investment Company but whose present ownership and responsibility therefore is currently in dispute, which obstructs the path of the Subject Watercourse; a catch basin in the middle of Virginia Way diverts the storm water into a storm drain pipe underneath Virginia Way; the catch basin also gathers other storm water from the surface of Virginia Way; the storm drain pipe terminates on the southwest side (downhill) of Virginia Way where it continues in a concrete 'V' ditch between 32142 Virginia Way (Viviani) and 32125 Virginia Way (Chaldu); the 'V' ditch ends above Coast Highway; in or about 1990, a flexible pipe was attached to the end of the 'V' ditch to prevent further erosion of the slope above Coast Highway; the flexible pipe ends on the slope approximately 10 feet above Coast Highway; [¶] . . . The Subject Watercourse continues from the flexible pipe into a culvert on the northeast side of Coast Highway (the 'Culvert'), obstructing the path of the Subject Watercourse . . . ; the Culvert slopes downhill along Coast Highway to the northwest; . . . approximately 30 feet northwest of the flexible pipe along the Culvert, a catch basin diverts the storm water into a storm drain pipe below Coast Highway which

The District alleged that a storm drain through Virginia Way was covered over in the 1960's, and that development in the City of Laguna Niguel in and before the 1990's caused greater erosion in the Subject Watercourse, causing eroded materials to travel downstream onto Virginia Way. In addition, the District alleged that on April 1, 1999, the District, the City of Laguna Beach and certain homeowners, including Chuck and Denise Viviani, John and Lynn Chaldu, and Kinney, or their predecessors in interest, executed the 1999 Agreement, concerning the construction and maintenance of a new storm drain system in the Subject Watercourse. The City of Laguna Beach had agreed to complete design of the plans for the system, obtain Caltrans' approval of the project, and act as plan administrator. The District and the homeowners agreed to make monetary contributions toward the construction and the homeowners also agreed to provide necessary easements.

In its first cause of action, the District sought specific performance of the 1999 Agreement as against the City of Laguna Beach. In its second cause of action, the District sought declaratory relief, with respect to obligations arising under the 1999 Agreement, as to all defendants other than Caltrans and Boone. In its third cause of action, the District sought declaratory relief against Caltrans and Boone with respect to

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continues to the ocean side of Coast Highway (the catch basin and storm drain pipe below Coast Highway shall hereinafter be referred to as the 'Cal Trans Facilities'); water which does not travel into the Cal Trans Facilities continues to the north along the side of the highway until it finds another catch basin through which it can ultimately pass to the ocean; [¶] . . . The Subject Watercourse originally continued through the Cal Trans Facilities where it proceeded in the natural watercourse, a gully, through the Boone Property to the ocean; Plaintiff is informed and believes . . . that in or about the 1920's to 1940's, the then owner of the Boone Property obstructed the path of the Subject Watercourse by filling in the Subject Watercourse with soil for development on the surface, and diverted the storm water into a corrugated metal pipe, connected to the Cal Trans Facilities, and buried under ground except where it ends on the Boone Property just above the cliffs above the ocean . . . , the storm water then making its way to the ocean."

their obligations, among others, to accept water from the Subject Watercourse, and to provide proper facilities for handling such water.

Kinney filed a cross-complaint and six amended cross-complaints against the state, the County of Orange, the City of Laguna Beach, the District, Three Arch Investment Company, Overton, the Chaldus, and the Vivianis. His initial cross-complaint was filed on July 5, 2002.

Kinney's sixth amended cross-complaint asserted four causes of action against the Chaldus and/or the Vivianis. The first cause of action, for nuisance and trespass, was asserted against the Chaldus and the Vivianis, in addition to the state, Three Arch Investment Company, and the District. That eight-page cause of action pertained to what he characterized as a dangerous condition arising out of a "combination of drainage systems draining toward [his] property." He asserted, inter alia, that the named cross-defendants had a duty to correct or mitigate the effects of the dangerous condition, and that the Chaldus and/or the Vivianis had blocked the water flow with certain improvements on their properties.

Kinney's third cause of action, against the Vivianis, was for nuisance and trespass for encroachment unrelated to storm water or drainage. Similarly, Kinney's fourth cause of action, against both the Chaldus and the Vivianis, had nothing to do with storm water problems on Virginia Way. Rather, it was a cause of action for nuisance for unreasonable parking. Kinney's sixth cause of action, against the Vivianis, likewise has nothing to do with storm water on Virginia Way. Instead, it is a cause of action for nuisance, arising out of purported littering, noisemaking and unruly behavior.

On December 1, 2003, Kinney obtained a default judgment against Three Arch Investment Company, on his fourth amended cross-complaint. The court awarded Kinney, inter alia, damages for structural repairs, future repairs, soils testing, debris and mud removal.

On November 4, 2005, the court granted two motions to bifurcate. The first was the motion of Boone to bifurcate the District's third cause of action. The second was the motion of Overton to bifurcate Kinney's claims against her on his cross-complaint.

Although the particular chronology is unclear from the record presently before us, judgments were entered with respect to several parties. In one matter, it was determined that Kinney could not compel the state to take title to certain property by way of escheat. In another, summary judgment was entered in favor of the District and against litigant Carola Lueder for her failure to timely file a claim against the District under the Tort Claims Act (Gov. Code, § 810 et seq.). In a third, a motion for judgment was granted in favor of Overton on Kinney's cross-complaint against her. (*Kinney v. Overton* (2007) 153 Cal.App.4th 482, 485.)

On May 15, 2006, various parties to the litigation, including the District and Kinney, stipulated "that there will be no res judicata effect and no collateral estoppel effect from the trial phase set to start May 15, 2006, as to any party other than Mike Boone, Caltrans or [the] District." The court so ordered.

The Boone trial began on October 22, 2007. The court found, inter alia, that Caltrans was required to accept water from the District, but that Boone was not required to accept water from either the District or Caltrans. It further found that the District and Caltrans had acted unreasonably with respect to drainage down to Boone's property and that Boone had acted reasonably. The court also found that Caltrans was "responsible for providing facilities to safely handle the surface water which historically and reasonably flow downhill where that water reaches PCH."

However, the court concluded: "The resolution of the flooding on Virginia Way, as well as the disbursement of the water reaching PCH, requires an engineering solution and cooperation from many property owners. However, as a result of the findings of fact at trial, the Court is unable to declare the rights and obligations of the remaining parties in a manner which leads to an effective resolution." On July 22, 2008,

the court entered judgment in favor of Boone on the District's complaint and on Caltrans's cross-complaint.

On September 16, 2008, the court, pursuant to the stipulation of the District and the City of Laguna Beach, entered judgment on the District's first cause of action, holding that the 1999 Agreement was void due to changed circumstances and impossibility. Thereafter, on January 28, 2009, the court entered an interlocutory judgment on the District's second cause of action.

On April 30, 2009, the Chaldus and the Vivianis filed a motion to dismiss Kinney's cross-complaint against them for failure to bring the matter to trial within the statutory period (Code Civ. Proc., §§ 583.310, 583.360). They claimed that, taking the period of one court-ordered stay into consideration, the last date to bring the cross-complaint to trial was February 27, 2009. The court granted the motion.

Kinney, having been declared a vexatious litigant in an unrelated proceeding, obtained a prefiling order from this court permitting him to file a notice of appeal from the order dismissing his cross-complaints. Kinney thereafter filed his notice of appeal.

II

DISCUSSION

A. Request for Judicial Notice:

As a preliminary matter, we note that Kinney included in the body of his opening brief a request that this court take judicial notice of the files, argument and decision in two prior decisions of this court—*Kinney v. State of California* (Apr. 8, 2005, G032629) [nonpub. opn.]) and *Kinney v. Overton, supra,* 153 Cal.App.4th 482. As we observed once previously, we observe again "that Kinney's request does not comply with California Rules of Court, rule [8.252] . . . . That rule require[s] that he file a separate motion, together with a proposed order and a copy of the matter to be judicially noticed. This he did not do." (*Kinney v. Overton, supra,* 153 Cal.App.4th at p. 497, fn. 7.) We

deny Kinney's request to take notice of the record in those prior proceedings, with the exception of the filed opinions in each case. (*Ibid.*) In any event, Kinney does not cite to the records in those previous matters, so our denial of his request has no impact. We caution him to comply with court rules in the future.

B. Dismissal Statute:

Code of Civil Procedure "[s]ection 583.310 provides: 'An action shall be brought to trial within five years after the action is commenced against the defendant.' Section 583.360, subdivision (a) provides: 'An action shall be dismissed by the court . . . on motion of the defendant . . . if the action is not brought to trial within the time prescribed in this article.' The statute serves to 'prevent [] prosecution of stale claims where defendants could be prejudiced by loss of evidence and diminished memories of witnesses [and] to protect defendants from the annoyance of having meritorious claims against them unresolved for unreasonable periods of time. [Citations.]' [Citation.]" (*SAGI Plumbing v. Chartered Construction Corp.* (2004) 123 Cal.App.4th 443, 447.) "'In reviewing the lower court's dismissal of [an] action for failure to prosecute, the burden is on appellant to establish an abuse of discretion. [Citation.] We will not substitute our opinion for that of the trial court unless a clear case of abuse is shown and unless there is a miscarriage of justice. [Citation.]' [Citation.]" (*Ibid.*)

Code of Civil Procedure section 583.310 "'only requires that the action be *brought to trial* within the five-year period, and places no limitation upon when the trial shall be completed.' [Citation.] Thus, once trial commences, the statute no longer applies, 'even though the proceedings amount only to a partial hearing. [Citation.]' [Citations.] [¶] Courts have given a variety of explanations for when an action has been 'brought to trial' for purposes of the five-year statute. 'A "trial" is the examination before a competent tribunal, according to the law of the land, of questions of fact or of law put in issue by pleadings, for the purpose of determining the rights of the parties.

[Citations.]' [Citations.] Thus, an action has been brought to trial if there 'is a trial of issues of fact with the purpose of determining the case on the merits.' [Citation.] In a nonjury case, the swearing of a single witness satisfies this requirement; in jury cases, the impaneling of the jury suffices. [Citation.]" (*In re Marriage of MacFarlane and Lang* (1992) 8 Cal.App.4th 247, 253-254.) "[R]ecognizing it would be impossible to identify every situation in which a mechanical application of Code of Civil Procedure section 583 [predecessor statute to current sections 583.310 and 583.360] would produce injustice, . . . the statute must be applied in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves. [Citation.]" (*General Motors Corp. v. Superior Court* (1966) 65 Cal.2d 88, 96.)

"For the purposes of Code of Civil Procedure section [583.310], actions by a plaintiff are treated as wholly separate from cross-actions brought by the defendant. [Citations.]" (*General Motors Corp. v. Superior Court, supra,* 65 Cal.2d at p. 93.) "It is clear that a cross-complaint is not subject to mandatory dismissal under section [583.310] until the lapse of five years from the filing of the cross-complaint. [Citations.]" (*Tomales Bay etc. Corp. v. Superior Court* (1950) 35 Cal.2d 389, 393-394; accord, *Smith v. El Centro Lodge No. 1325* (1969) 271 Cal.App.2d 713, 717.)

C. Analysis:

Kinney claims the action commenced, within the meaning of Code of Civil Procedure section 583.310, when: (1) he obtained a default judgment against Three Arch Investment Company, in 2003; (2) there was a trial as to who owned Virginia Way; (3) there was a trial against Overton, in 2006; (4) there was a trial on the Boone matter, in 2007; and/or (5) there was a determination, in 2009, that the 1999 Agreement was void. He also contends that, pursuant to Code of Civil Procedure section 916, the periods of

time when various matters were on appeal tolled the five-year statute. We address these issues in turn.

(1) Default judgment against Three Arch Investment Company—

Kinney argues that the five-year statute ceased to apply as of 2003, when he obtained a default judgment against Three Arch Investment Company on his fourth amended cross-complaint. In the fourth amended cross-complaint, Kinney asserted two causes of action affecting Three Arch Investment Company and others. The eighth cause of action, for dangerous condition, was asserted against Three Arch Investment Company, the District, and the state. In that cause of action, Kinney claimed that those three cross-defendants should have known of the dangerous condition and had a duty to correct it or mitigate its effects. In the ninth cause of action, against Three Arch Investment Company and the state, Kinney sought, inter alia, to quiet title to Virginia Way in the state, due to the failure of Three Arch Investment Company to pay taxes on that street. He also requested a determination of the maintenance obligations of the owner of Virginia Way, and a determination of easements across that street.

In the December 1, 2003 default judgment against Three Arch Investment Company, on Kinney's fourth amended cross-complaint, the court awarded Kinney damages for structural repairs, future repairs, soils testing, debris and mud removal, and as well as costs, for a total award of $53,259.55. It also granted Kinney the right to remove and replace a drain cover owned by Three Arch Investment Company and located on Virginia Way, near Kinney's property.

Kinney now says that when the default judgment was entered against Three Arch Investment Company in 2003, this was a partial determination of the unreasonable parking claims against the Chaldus and the Vivianis because the court held Virginia Way to be a private street and "unreasonable parking means one thing on a public street and a different thing on a private street[]." Kinney also says that an action commences when a witness is sworn, and thus commenced when he testified for the default judgment.

We disagree. There is no indication that any unreasonable parking claims went to trial. Rather, a simple default judgment was entered with respect to claims having nothing to do with whether or not the Chaldus and the Vivianis park perpendicular to the traffic flow on Virginia Way. Furthermore, "[a] default judgment is not a trial for the purposes of the five-year statute, and this is so even though there is a hearing involving evidence with respect to the judgment. [Citation.]" (*Lakkees v. Superior Court* (1990) 222 Cal.App.3d 531, 536; accord, *In re Marriage of Dunmore* (1996) 45 Cal.App.4th 1372, 1377.)

(2) Judgment in favor of State of California—

In his ninth cause of action, as noted previously, Kinney sought to compel the state to take title to Virginia Way. Obviously, if he could compel the state to take title, he could then pursue the state for liabilities arising out of the ownership of the street. However, Kinney did not prevail on his legal arguments and we held, in a prior opinion (*Kinney v. State of California, supra*, G032629), that the state could not be compelled to take title. (*Kinney v. Overton, supra*, 153 Cal.App.4th at p. 485.)

Kinney contends, without citation to the record, that when the state filed a demurrer, it "resulted in a 'trial' as to who owned the street." In other words, he argues the action on his cross-complaint against the Chaldus and the Vivianis commenced at that time, so as to make the five-year dismissal statute inapplicable. However, the legal issue of whether the state could be required to take title to the street by way of escheat had nothing to do with whether the Chaldus or the Vivianis could be held liable for their purported actions in connection with drainage problems, the location of a wall or a light pole, or parking, littering, noisemaking or unruly behavior. Inasmuch as the proceedings in connection with the cross-complaint against the state addressed no contested issues of fact or law affecting the cross-complaint against the Chaldus and the Vivianis, the commencement of those proceedings did not constitute either the commencement of the action, or a partial trial, of the cross-complaint against the Chaldus and the Vivianis.

(*SAGI Plumbing v. Chartered Construction Corp., supra,* 123 Cal.App.4th at pp. 448-449.)

(3) Overton trial—

In his sixth amended cross-complaint, Kinney alleged that Overton owned certain property located on South Coast Highway, in Laguna Beach, to the north of 11th Avenue. He also alleged that Overton had built a six-foot-tall metal fence across 11th Avenue, blocking access along an easement over 11th Avenue. In his second cause of action, against Overton, Kinney alleged that Overton's fence constituted a nuisance, inasmuch as it impeded the use of the easement across 11th Avenue.

Kinney claims that when the first witness was called on the bifurcated Overton trial in 2006, the action on his cross-complaint against the Chaldus and the Vivianis commenced and the five-year statute became inapplicable. Kinney cites no portion of the record to show that the Overton trial addressed any contested issue of fact or law affecting the cross-complaint against the Chaldus and the Vivianis, based on those parties' activities on Virginia Way. Consequently, the trial of the Overton matter did not constitute either the commencement of the action, or a partial trial, of the cross-complaint against the Chaldus and the Vivianis. (*SAGI Plumbing v. Chartered Construction Corp., supra,* 123 Cal.App.4th at pp. 448-449.)

(4) 2007 Boone trial—

Boone sought an order bifurcating the District's third cause of action against him and Caltrans. In a November 4, 2005 order, the court ruled: "[T]he non-contractual rights, duties, and liabilities of the District, Caltrans, and Boone should be decided before the contract is interpreted and [the] Kinney/Lueder claims are decided. . . . Nearly all parties seek a determination of rights and duties regarding 'the waters.' This should go first. Boone's motion is Granted." Trial on these matters was set for May 15, 2006.

On that date, various parties to the litigation, including the District and Kinney, stipulated that there would "be no res judicata effect and no collateral estoppel effect from the trial phase set to start May 15, 2006, as to any party other than Mike Boone, Caltrans or [the] District." The court so ordered.

In its June 23, 2008 revised statement of decision, the court noted that the parties to that phase of the trial were the District, as plaintiff, Caltrans, as defendant and cross-complainant, and Boone, as defendant, cross-defendant and cross-complainant. The court observed: "The first phase of trial was limited to (1) the District's Third Cause of Action for Declaratory Relief against CalTrans and Boone in the operative Third Amended Complaint, . . . and (2) CalTrans' Cross-Complaint against Boone alleging causes of action for Declaratory Relief . . . . [¶] The gist of District's Third Cause of Action is the request for the judicial determination of the rights and responsibilities of District, CalTrans and Boone to accept and transfer storm water flowing downhill over their respective properties. Material to the Court's adjudication of the parties' rights and responsibilities is the characterization of the waters, whether they are 'surface waters' or within a 'natural watercourse.'"

The court also said: "In sum, the jury determined that there was no 'natural watercourse', and that the waters in question are 'surface waters'. Further, the jury determined that the District and CalTrans had been unreasonable, and Boone reasonable, in addressing the waters in question. The jury also specifically found that 'The surface waters which crossed Virginia Way flowed downhill to the ocean through various land features such as the ravines and washes that cross lot 35 and properties to the north and south.'" On July 22, 2008, the court entered an interlocutory judgment of final disposition as to Boone, in which it decreed that neither the District nor Caltrans would recover from him.

Kinney emphasizes the portion of the November 4, 2005 bifurcation order stating, "Nearly all parties seek a determination of rights and duties regarding 'the

waters.'" He argues that because the Boone trial addressed the characterization of the waters, and the water and the drainage issues are all interrelated, once the Boone trial commenced, the five-year statute became inapplicable vis-à-vis his cross-complaint against the Chaldus and the Vivianis.

However, Kinney downplays the fact that on May 15, 2006, when the Boone trial was scheduled to begin, he stipulated, and the court so ordered, that there would "be no res judicata effect and no collateral estoppel effect . . . as to any party other than Mike Boone, Caltrans or [the] District." Therefore, even if the issues of law or fact addressed in the Boone trial otherwise might have had a potential bearing upon issues pertaining to Kinney's first cause of action against the Chaldus and the Vivianis, that ceased to be the case when the stipulation and order was entered. No matter what the trier of fact found with respect to the nature of the waters plaguing Virginia Way, the findings did not bind the Chaldus or the Vivianis, and Kinney cites no legal authority to the contrary. Therefore, the Boone trial did not take Kinney's cross-complaint against the Chaldus and the Vivianis outside the operation of the five-year statute.

(5) 2009 determination that 1999 Agreement is void—

After the Boone trial had terminated, the District and the City of Laguna Beach entered into a stipulation. They recited that they wished to forgo a trial on the District's first cause of action, against the City of Laguna Beach, for specific performance of the 1999 Agreement. They stipulated for the entry of an interlocutory judgment to the effect that the 1999 Agreement was void and unenforceable due to changes in circumstances that rendered performance of the agreement impossible, and that the sums paid to the city by Chuck and Denise Viviani, John and Lynn Chaldu, and others, pursuant to the agreement, would be refunded, and that, thereafter, no party to the agreement would have any further rights or obligations thereunder. On September 16, 2008, the court so entered an interlocutory judgment on the District's first cause of action.

On January 28, 2009, the court entered an interlocutory judgment on the District's second cause of action, for declaratory relief as to the rights and obligations, under the 1999 Agreement, of the District, the City of Laguna Beach, and the defendant homeowners who were parties to the agreement. It reiterated verbatim the portion of the September 16, 2008 order to the effect that the agreement was void, the sums paid to the city by the homeowners would be refunded, and, thereafter, no party to the agreement would have any further rights or obligations thereunder. The January 28, 2009 interlocutory judgment contained no introductory language explaining what prompted its entry.

Kinney, without citation to the record, asserts that the January 28, 2009 interlocutory judgment, like the September 16, 2008 order, was the result of the stipulation of the District and the City of Laguna Beach. The Vivianis state that the January 28, 2009 interlocutory judgment was entered "[i]n response to a motion for judgment filed by the District." In support of this assertion, the Vivianis cite the register of actions, but it would appear the record contains no copy of any motion filed by the District and we do not know if any other party filed a responsive pleading.

Irrespective of how the January 28, 2009 interlocutory judgment came about, Kinney says that, when it was entered, the five-year statute became "moot." He states that even though the Chaldus and the Vivianis were not parties to the stipulation of the District and the City of Laguna Beach, the stipulation resulted in a judgment not only declaring the 1999 Agreement to be void, but also holding that the Chaldus and the Vivianis were entitled to refunds of amounts they had paid pursuant to the agreement. Kinney claims that the Chaldus and the Vivianis are, therefore, necessarily bound by the decision. Perhaps he means to argue, albeit without citation to either the record or legal authority, that the Chaldus and the Vivianis have accepted the benefits of the interlocutory judgment and are therefore bound by it.

The Chaldus argue that the District's second cause of action for declaratory relief with respect to the 1999 Agreement was not litigated. They construe the stipulation of the District and the City of Laguna Beach, that the agreement was void, to have been a part of the Boone trial. They emphasize that they were not parties to the Boone trial and that the May 15, 2006 stipulation and order made clear they would not be bound by that trial. In short, they argue that no trial has occurred with respect to Kinney's cross-complaint against them because there has been no determination of an issue of law or fact which brought the action to the stage where final disposition can be made.

The Vivianis argue the determination that the 1999 Agreement was void has no bearing on the claims Kinney asserts against them in his cross-complaint, inasmuch as none of his claims against them are based on the agreement. They also point out that Kinney did not raise the matter of the January 28, 2009 interlocutory judgment in opposition to their motion to dismiss. This being the case, they argue he cannot raise it for the first time on appeal. (*Hogan v. Country Villa Health Services* (2007) 148 Cal.App.4th 259, 269-270 [issue waived when not raised in the trial court].)

The thrust of Kinney's long and rambling first cause of action, as it pertains to the Chaldus and the Vivianis, is that they somehow impaired the drainage on Virginia Way and had a duty to correct the drainage problems or mitigate their effects. Kinney did not, however, claim that the Chaldus or the Vivianis had, pursuant to the 1999 agreement, either taken or failed to take actions that had caused drainage problems on Virginia Way. In that respect, he made no allegation that their involvement with the agreement gave rise to liability. In other words, whether or not the 1999 Agreement was void had no bearing on whether or not the Chaldus and the Vivianis had somehow caused the drainage problems.

Yet at the same time, Kinney did address the 1999 Agreement in his first cause of action. Kinney recited that the Chaldus and the Vivianis were parties to that agreement and that "in his answer as a defendant in this litigation, . . . [he] rescinded that

contract based on mistake since the neighbors, including . . . [himself], had . . . no obligation to repair or improve the drainage . . . ." In other words, Kinney claimed that neither he, nor the Chaldus or the Vivianis, had any liability under the agreement. Consequently, in his prayer for relief at the end of his cross-complaint, Kinney sought a declaration as to whether the 1999 Agreement was void, as he alleged.

This being the case, the thread upon which Kinney's appeal rests is the January 28, 2009 interlocutory judgment holding the 1999 Agreement void. However, Kinney offers no legal authority to the effect that when a judgment is entered upon a complaint based on the stipulation of two parties to that complaint, it constitutes the commencement of an action, or a partial trial, on a cross-complaint against persons who neither stipulated to the entry of judgment nor participated in the litigation on the complaint. To reach the result Kinney desires, we would have to hold that a trial had commenced against the Chaldus and the Vivianis even though they were not parties to it and had no apparent right to participate in it.

We cannot apply the five-year statute in a mechanical way that causes injustice. (*General Motors Corp. v. Superior Court, supra*, 65 Cal.2d at p. 96.) Rather, "the statute must be applied in light of all the circumstances in the individual case, including the acts and conduct of the parties and the nature of the proceedings themselves. [Citation.]" (*Ibid.*) Considering the fact that the Chaldus and the Vivianis had no apparent opportunity to participate in the purported trial commenced against them, we find it difficult to conclude that indeed a trial was commenced against them, within the meaning of the five-year statute.

Of course, the trial court was in a better position than we are to know whether the Chaldus and the Vivianis had an opportunity to participate in the proceedings that resulted in the entry of the January 28, 2009 interlocutory judgment. However, Kinney did not address this issue in the trial court. To compound problems, we cannot review the matter because the record does not contain either a copy of any motion

prompting the entry of the January 28, 2009 interlocutory judgment or copies of any opposing or supporting papers. The burden is on Kinney, as the appellant, to provide an adequate record for review. (*Dawson v. Toledano* (2003) 109 Cal.App.4th 387, 402.) We are persuaded that Kinney has waived his right to claim, on appeal, that the trial commenced against the Chaldus and the Vivianis when the interlocutory judgment was entered, both because Kinney failed to raise the issue before the trial court (*Hogan v. Country Villa Health Services, supra,* 148 Cal.App.4th at pp. 269-270) and because he failed to provide an adequate record for review of that point (*Dawson v. Toledano*, *supra*, 109 Cal.App.4th at p. 402).

(6) Tolling—

Code of Civil Procedure section 583.340 provides that "[i]n computing the time within which an action must be brought to trial[,]" one excludes the time during which "[p]rosecution or trial of the action was stayed or enjoined." (Code Civ. Proc., § 583.340, subd. (b).) Pursuant to Code of Civil Procedure section 916, subdivision (a), with certain exceptions, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."

Kinney, citing Code of Civil Procedure section 916, argues vaguely that because "several appeals occurred and each appeal had consequences on the disputed issues, [he] believes those appeal time-periods stayed the 5 year statute, which would mean 5 years have yet to run." This is at least the sixth appeal arising out of the underlying lawsuits. To the best of our recollection, none of the prior appeals concerned a judgment or order embracing any of the matters raised in Kinney's cross-complaint against the Chaldus or the Vivianis. It is Kinney's burden to specifically identify each appeal he contends should have given rise to an automatic stay that would, in turn, have

prevented him from prosecuting his cross-complaint against the Chaldus and the Vivianis. Having failed to do so, he loses on this point.

As an aside, we note the trial court, on March 12, 2004, ordered a stay with respect to Kinney's appeal against the state. The Chaldus and the Vivianis, in their motion to dismiss, took the period of that stay into consideration in the calculation of the five-year period. Kinney makes no argument that they failed to properly take the period of that court-ordered stay into account.

III

DISPOSITION

The judgment is affirmed. The Chaldus and the Vivianis shall recover their costs on appeal.

MOORE, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.